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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. PATRICIO ROSAS, JR., Defendant and Appellant.	C084130 (Super. Ct. No. CRF165061)

A jury found defendant Patricio Rosas, Jr., guilty of 12 counts of forcible rape, 12 counts of incest, and one count of possession of a controlled substance. It also found true eight enhancements alleging J. R. was 14 years old or older at the time she was raped and that the rapes occurred during the commission of a burglary. The trial court found defendant had served two prior prison terms.

On appeal, defendant contends the court improperly amended the information to add a rape and an incest charge and a prior prison term allegation. As to the allegation, he argues the court violated his right to a jury trial on that finding and that it is not

supported by sufficient evidence. He further contends sufficient evidence does not support the jury's finding that J. R. was 14 years old or older at the time of certain rape and incest convictions, nor does it support four of six rape convictions occurring in a shed on the premises of defendant's employment. He argues instructional error occurred by the trial court's failure to instruct on the sufficiency of circumstantial evidence required to prove guilt and that any one witness's testimony is sufficient to prove a fact. Finally, defendant contends cumulative error resulted and his abstract of judgment must be corrected. We agree defendant's abstract must be corrected but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Crimes

J. R. was born December 4, 1999, and defendant is her father. When J. R. was half way through the seventh grade, she and defendant, with the rest of their family, moved to Woodland and J. R. began attending middle school where she remained until she completed the eighth grade. J. R. then attended two high schools for ninth grade, and yet another high school for tenth grade.[1]

After moving to Woodland, defendant's behavior toward J. R. changed and he started acting aggressive and angry with her. Defendant also began using methamphetamine. Starting when J. R. attended Lee Middle School, defendant brought her to the apartment complex where he worked as a maintenance man, especially when J. R. skipped school. At the beginning, J. R. would not leave the car but she eventually

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[1] The parties agree J. R. was 12 and 13 years old in seventh grade (2012-2013 school year), 13 and 14 years old in eighth grade (2013-2014 school year), 14 and 15 years old in ninth grade (2014-2015 school year), and 15 and 16 years old in 10th grade (2015-2016 school year).

started walking around the apartment complex, talking to the apartment owner, and helping defendant with his maintenance duties.

Once when J. R. and defendant were done cleaning a recently vacated apartment, defendant told her to go into the bedroom and take her pants off. After he repeatedly told her to do so, J. R. complied because defendant told her he needed to check something. J. R. felt uncomfortable and told defendant she thought his request was weird. Defendant then took off J. R.'s underwear and told her to open her legs. J. R. refused. Defendant opened J. R.'s legs himself and started touching her vagina with his hands and his mouth. Defendant then got on top of J. R. and put his penis in her vagina. After he ejaculated, defendant left the bedroom and J. R. cleaned herself with a rag. This was the only rape that occurred while J. R. attended middle school.

A week to a month later, J. R. was again helping defendant in a vacant apartment. When he was done working, defendant went in a closet and told J. R. to follow him. He smoked methamphetamine and then told J. R. to remove her clothes. J. R. was afraid defendant would overpower her, so she went to the closet where she saw defendant take off his clothes. Despite J. R.'s protests, defendant took her clothes off and then got on top of her. He put his penis in her vagina and moved around with his entire weight on top of her body. After defendant ejaculated, J. R. cleaned herself with a rag and a "white" substance was left behind. She felt disgusted.

Defendant continued to rape J. R. at the apartment complex where he worked at least once a week. She believed it occurred three to five times in a vacant apartment, but it usually occurred in a shed that was used to store defendant's tools, various appliances, and carpet remnants. J. R. was raped more than five times in the shed. Each time defendant raped her, it happened the same way. He would finish with his work for the day, smoke methamphetamine, and then tell her to take off her clothes. Defendant would make J. R. lie on a carpet remnant, and then he would put his penis in her vagina. He

would always ejaculate inside of her. Defendant also had sex in the shed with his girlfriend. The two would usually have intercourse on a carpet remnant as well.

J. R. testified about four times defendant raped her in a car. Once was at night on the way to a casino while she attended high school. On the way, defendant parked on the other side of a locked gate. He covered his car with the tall grass growing in the field where he parked. When he returned to the car, he told J. R. to take off her clothes. Once J. R.'s clothes were off, defendant got on top of her and put his penis in her vagina. After he ejaculated inside of her, defendant drove away with all the grass still on the car. J. R. cleaned herself with a rag she found in the car.

Another time defendant and J. R. were driving to a casino when defendant stopped on the same road as before but in a different location. He drove up to an abandoned house that had a circle of trees in front. It was dark and he raped her the same way he had done before.

Another time when the two were driving on Road 25, defendant pulled over and told J. R. to take off her clothes. He then raped her the same way he always had.

On yet another occasion, defendant pulled off the freeway between Woodland and Yuba City where semitrucks usually parked. He parked away from the semitrucks where the car would be hidden from the freeway by a rock wall. Defendant then raped her the same way he always had.

Defendant was arrested after J. R. told school officials about the rapes. He was in possession of .96 grams of methamphetamine when he was taken into custody. Defendant's DNA was detected in the semen from a stain on a rag found in his car. A carpet remnant taken from the shed had a total of 12 semen stains, five of which were tested. Defendant's DNA was detected in the semen of all five stains, and J. R's DNA was detected in one stain. A third DNA profile was also detected. The other four stains revealed inconclusive results because the DNA sources contributed the same amount of

DNA as one another. Given the amount of DNA present in the stain, the source was likely vaginal secretion or saliva.

B

Legal Proceedings

Based on the evidence presented at the preliminary hearing, the information charged defendant with one count of rape and one count of incest occurring in a vacant apartment, a total of five counts of rape and five counts of incest occurring in a car, and a total of six counts of rape and six counts of incest occurring in the shed. Defendant was also charged with misdemeanor possession of a controlled substance. The information alleged defendant had served two prior prison terms -- one following a June 9, 2008, conviction and the other following a July 7, 2003, conviction.

Following J. R.'s testimony, the prosecution indicated it intended to move to amend the information to conform to proof by changing a rape and incest count alleged to have occurred in a car to having occurred in a vacant apartment. Because the allegation changed from a car to a vacant apartment, the prosecution also said it intended to add an allegation that the rape occurred when J. R. was 14 years old or older and during the commission of a burglary. Following the close of evidence, the court allowed the prosecutor to amend the information to contain the same number of alleged offenses (although an additional sentencing allegation), with a rape and an incest charge alleged to have occurred in a car removed from the information and a rape and an incest charge alleged to have occurred in a vacant apartment added. The prior prison term allegations remained as alleged in the initial information. Defendant orally opposed the prosecution's motion arguing that recrafting the rape and incest charges as having occurred in a vacant apartment prejudiced him because of the timing of the amendment and the increased penalty given the sentencing allegation.

The jury returned verdicts of guilty on all counts and associated enhancements. During a court trial on defendant's prior prison term allegations, the prosecution moved

to amend the information by interlineation to reflect defendant had been convicted of a felony on December 12, 2003, instead of June 7, 2003. The court granted the motion without objection from defendant. The court then found both prior prison term allegations true.

The court later sentenced defendant to a total of 200 years to life plus 62 years. In calculating that sentence, the court imposed 25 years to life on each of the eight rapes alleged to have occurred when J. R. was 14 years old or older and during the commission of a burglary and 11 years on each of the four remaining rape convictions. It also imposed, and then stayed pursuant to Penal Code[2] section 654, three years on each of the incest convictions. Finally, the court imposed a concurrent 180 days on the possession of a controlled substance conviction. As to the prior prison term enhancements, the court imposed two additional years on each rape conviction carrying an indeterminate sentence and two additional years on defendant's determinate sentence.

DISCUSSION

I

The Court Did Not Abuse Its Discretion By Amending The Information

Defendant contends the court erroneously amended the information to add a rape and an incest charge occurring in a vacant apartment (counts 11 and 12) and to add a prior prison term allegation. We disagree.

A

Amendment To Charges

An information may not be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination." (§ 1009.) "Due process requires that 'an accused be advised of the charges against him so that he has a reasonable opportunity to

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[2] All further section references are to the Penal Code unless otherwise indicated.

prepare and present his defense and not be taken by surprise by evidence offered at . . . trial.' [Citation.] Thus, it is the rule that 'a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based.' " (*People v. Graff* (2009) 170 Cal.App.4th 345, 360.) " '[A]t a minimum, a defendant must be prepared to defend against all offenses of the kind alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.' " (*People v. Jones* (1990) 51 Cal.3d 294, 317.)

"The information plays a limited but important role -- it tells a defendant what kinds of offenses he is charged with and states the number of offenses that can result in prosecution. However, the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript. This is the touchstone of due process notice to a defendant." (*People v. Jeff* (1988) 204 Cal.App.3d 309, 342.) Notice will be found "so long as (1) the information informs defendant of the nature of the conduct with which he is accused and (2) the evidence presented at the preliminary hearing informs him of the particulars of the offenses which the prosecution may prove at trial." (*Id.* at pp. 341-342.) We review the trial court's decision to allow amendment of the information for abuse of discretion. (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1581.)

Defendant argues the court improperly permitted the prosecution to add charges to the information because the evidence at the preliminary hearing informed him that he need only defend against one rape and one incest charge occurring in a vacant apartment. Defendant interprets the preliminary hearing and the information too narrowly. The information and preliminary hearing notified defendant he was alleged to have committed 12 acts of forcible rape against his daughter starting when she turned 14 years old and ending on October 14, 2015, when she reported his conduct to school officials. These rapes occurred outside the home, at defendant's place of business, and in his vehicle. By amending a rape and an incest charge occurring in a car to one occurring in a vacant

apartment, the court did not make a material change to the information because defendant already knew he would have to defend against forcible rapes occurring in vacant apartments and within the time frame alleged.

"[U]nder normal circumstances, [a defendant's] opportunity to prepare an effective defense would not be affected merely because the evidence at trial showed the offenses occurred at a different time (within the time frame alleged in the original information) or a different [place (within the location alleged in the original information)]. Even in alibi cases, neither the time [citation] nor the place at which an offense is committed [citation] is material, and an immaterial variance will be disregarded [citation]." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 906.) Defendant does not argue he was misled when mounting his defense. Indeed, as described, the material allegations of the complaint remained the same. Because the amendment did not change the basic allegations, we can only conclude the variance immaterial. Accordingly, there was no abuse of discretion and no due process violation.

B

Amendment To Allegation

In *Tindall,* our Supreme Court held "section 1025, subdivision (b) requires that the same jury that decided the issue of a defendant's guilt 'shall' also determine the truth of alleged prior convictions. Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged [citation], it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged. Thus, under the circumstances of [th]at case, [our Supreme Court found] that the postdischarge amendment, which increased defendant's prison sentence from four years to 25 years to life, was erroneous." (*People v. Tindall* (2000) 24 Cal.4th 767, 782.)

Relying on *Tindall,* defendant argues the amendment to his prior prison term allegation after his jury was discharged was improper because the amendment amounted

to a new allegation not incorporated in his prior jury waiver. Indeed, the abstracts of judgment admitted to prove the allegation show a different conviction for each date alleged. The problem with defendant's argument, however, is that it was not alleged he had a prior serious felony conviction; it was alleged he had served a *prior prison term*. Here, the convictions alleged in the original allegation and the amended allegation corresponded to the same prison term. Thus, even though amended to state a different conviction, the allegation remained the same and *Tindall* is not implicated. (See *People v. LaVoie* (2018) 29 Cal.App.5th 875, 885-886 [*Tindall* applies to amendments that are substantial in nature].) Similarly, because the allegation remained as originally alleged, the court was not required to seek an additional jury trial waiver.

II

Sufficient Evidence Supports The Jury's Verdicts And The Amended Prior Prison Term Enhancement

Defendant contends sufficient evidence does not support the jury's finding J. R. was 14 years old or older at the time she was raped nor does it support four of six rapes and acts of incest occurring in the shed. He argues the amended prior prison term enhancement lacks support as well. We disagree.

" 'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) This court views the "evidence in the light most favorable" to the verdict, and presumes the existence of every fact the jury might reasonably deduce from it. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not "substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones, supra*, 51 Cal.3d at p. 314.) "[T]he testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions." (*People v. Leigh* (1985) 168 Cal.App.3d 217, 221.)

A

Sufficiency Of Convictions

Defendant attacks the evidence showing J. R. was 14 years old or older at the time most of the rapes occurred as being insufficient. He does so in an attempt to strike multiple sentencing enhancements and reverse multiple incest charges, as well as make multiple forcible rape convictions eligible for a reduced sentence. Defendant further attacks the evidence supporting four of his six rape convictions occurring in the shed. We conclude sufficient evidence supports J. R.'s age and all six rape convictions occurring in the shed.

Generic testimony from a child victim of sexual abuse is sufficient if it describes "*the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)"; the "*number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping')"; and "*the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*People v. Jones, supra,* 51 Cal.3d at p. 316.)

Defendant argues the evidence did not support a finding J. R. was 14 years old or older because her testimony was either ambiguous as to whether she was 13 or 14 years old or completely lacking regarding the time frame in which the rapes occurred. The People counter that J. R.'s testimony established defendant began raping her at the end of her eighth grade year when she was 14 years old and thus all the rapes occurred when J. R. was 14 years old or older. We agree with the People.

While J. R. testified she did not know whether she was 13 or 14 years old when defendant started raping her, she did testify she was raped only once while attending Lee

Middle School. She also said the next rape occurred weeks to a month later, inferably when she was not attending Lee Middle School. The testimony also revealed J. R. attended Lee Middle School for the entire eighth grade before beginning ninth grade at a different school. Taken together, the jury could reasonably infer defendant began raping J. R. at the end of her eighth-grade year when the parties agree J. R. was 14 years old.

In his reply brief, defendant argues J. R.'s testimony was not credible and of solid value, pointing to her confused description of the rapes occurring in the vacant apartments. J. R.'s description is not so confused as to raise doubt to its sufficiency. (*People v. Mejia* (2007) 155 Cal.App.4th at 86, 98 [conflicts and testimony that is subject to justifiable suspicion do not justify reversal as it is up to the jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends].) Even if defendant is right and J. R. attended Lee Middle School at the time of both rapes in the vacant apartments, the jury could still reasonably infer J. R. was 14 years old or older every time defendant raped her. J. R. testified the first two times defendant raped her were both in vacant apartments. The second rape occurred weeks to a month after the first, and then defendant raped her nearly every week, inferably when she did not attend Lee Middle School. Defendant's theory still places both rapes as occurring at the end of J. R.'s eighth-grade year, when she was 14 years old.

Defendant relies on *Mejia* where the appellate court held the evidence was insufficient to support the defendant's conviction of continuous sexual abuse, which requires the defendant engaged in " 'three or more acts of substantial sexual conduct' " with a child under 14 years of age over a period of at least three months. (*People v. Mejia, supra,* 155 Cal.App.4th at pp. 93-94.) The defendant was charged with acts occurring " 'on or between June 1, 2004 and September 17, 2004,' " and the victim testified the defendant had molested her 10 times in June and July and at least twice in September, however the abuse had not occurred every week. (*Id*. at pp. 93-95.) On appeal, the court held that although the jury could reasonably infer "defendant's abuse

began sometime in June and continued to some date in September . . . the jury could only speculate that the first incident occurred early enough in June to satisfy the 90-day requirement expiring on September 17, 2004." (*Id*. at p. 95.)

In *Mejia*, the burden was arduous as the prosecution needed to prove sexual acts occurring within a 90-day time frame, and the evidence showed no start date to those acts. (*People v. Mejia*, *supra*, 155 Cal.App.4th at pp. 94-95.) Here, the burden was not so difficult. The prosecution need prove only that defendant raped J. R. after December 4, 2013, her 14th birthday. J. R. was consistent in her testimony that defendant began raping her while she attended Lee Middle School and only one (or as defendant argues two) rapes occurred during that time. Those rapes occurred weeks to a month apart from one another, and then continued nearly every week after J. R. left Lee Middle School to attend the ninth grade. While this testimony may not establish the exact date the rapes occurred, it established that they occurred when J. R. was 14 years old. Thus, sufficient evidence supports the jury's finding that J. R. was 14 years old or older at the times defendant raped her.

Sufficient evidence also supports all six rape convictions occurring in the shed. Defendant argues the evidence was too generic to support four of those convictions because J. R. testified that anywhere from three to more than five rapes occurred there. Again, we disagree. Defendant points to a single instance where J. R. said she was raped three times, but her entire testimony in this regard was "three, four, five times or more." This was consistent with the whole of J. R.'s testimony where she stated defendant raped her more than five times in the shed, and that while she did not know how many times defendant raped her there, she was raped nearly every week and mostly in that location. This testimony is at least as certain as the " 'twice a month' " or " 'every time we went camping' " approved in *Jones*; and therefore, we find that the testimony is sufficiently certain to support all six convictions of forcible rape occurring in the shed. (*People v. Jones*, *supra*, 51 Cal.3d at p. 316.)

B

Sufficiency Of Enhancement

Defendant argues sufficient evidence does not support the court's true finding on the amended prior prison term allegation because the evidence did not show defendant served a prison term resulting from a felony conviction on the date alleged. "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (§ 960.) As described, the information always alleged a single prison term for this enhancement regardless of the date defendant was alleged to have been convicted of the felony resulting in that prison term. Accordingly, the sufficiency of defendant's enhancement cannot rest upon a defect in the information when defendant was afforded adequate notice.

"Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) The prosecution proved through the admission of defendant's prison records that he was convicted of a felony in December 2003 as alleged in the amended prior prison term allegation. He then remained in custody until he was released on parole in February 2005. In September 2006 his parole was revoked and he returned to custody until December 2006 when he was again paroled. In June 2008, defendant was convicted of a felony and returned to custody until October 2011 when he was released on community supervision. Defendant committed the current offenses between December 2013 and October 2015. Thus, sufficient evidence supports the trial court's finding on the amended prior prison term allegation.

III

There Was No Prejudicial Instructional Error

Defendant contends the trial court committed two instances of instructional error. He argues the court failed in its duty to instruct the jury on the sufficiency of circumstantial evidence to prove his guilt and in its duty to instruct the jury that the testimony of any one witness was sufficient to prove a fact. We conclude there was no prejudicial error.

Trial courts have a duty to sua sponte instruct " 'on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case.' " (*People v. Simon* (2016) 1 Cal.5th 98, 143, citing *People v. Price* (1991) 1 Cal.4th 324, 442.) We review defendant's claim of instructional error de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

A

CALCRIM No. 224

CALCRIM No. 224 provides: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." Defendant argues the court should have instructed the jury with this instruction, as trial counsel requested, instead of CALCRIM No. 225, which states the same legal principles but regarding only defendant's intent. We disagree.

CALCRIM No. 224 " 'must be given sua sponte when the prosecution substantially relies on circumstantial evidence to prove guilt. [Citations.]' [Citation.] 'The instruction should not be given "when the problem of inferring guilt from a pattern of incriminating circumstances is not present." ' " (*People v. Rogers* (2006) 39 Cal.4th 826, 885.) It should also not be given "when the circumstantial evidence is incidental to and corroborative of direct evidence." (Bench Notes to CALCRIM No. 224 (2018 ed.) p. 52.) In fact, this type of instruction can be confusing and ought not to be given if circumstantial evidence is "not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct . . . ." (*People v. Anderson* (2001) 25 Cal.4th 543, 582 [discussing similar CALJIC instruction].)

Defendant argues the prosecutor substantially relied on circumstantial evidence during her closing argument to prove defendant's guilt in the form of the DNA evidence, the pretext phone call, and J. R.'s mother's testimony. He acknowledges the prosecutor used this evidence to corroborate J. R.'s testimony, but argues that the length of time and manner in which the prosecutor argued the evidence to the jury made the circumstantial evidence not merely incidental to the prosecutor's argument. We find no case, and defendant cites none, concluding the use of corroborating evidence was so central to the theory of guilt that it required the giving of CALCRIM No. 224. And while defendant argues the prosecutor's use of the corroborating evidence was "not merely *incidental* to J. R.'s testimony," he does not explain this conclusion. Instead, defendant cites *People v. Jerman* (1946) 29 Cal.2d 189, 196-197, where the defendant's own testimony gave evidence of every element of the charge. Our Supreme Court reasoned that where every element of the charge was substantiated by direct evidence, the circumstantial evidence was incidental or corroborative and no instruction was required. (*Id.* at p. 197.)

Here, J. R.'s testimony provided direct evidence of every element of the charged rape and incest counts, except for defendant's intent. J. R. testified to the circumstances surrounding the rapes and defendant's acts of force when penetrating her vagina and

ejaculating inside of her. Her testimony further established where and when the rapes occurred and provided the context for the circumstantial evidence to be corroborating evidence. Just because the prosecutor could point to many corroborating pieces of circumstantial evidence did not transform the case to one relying substantially on circumstantial evidence. As defendant concedes, the prosecutor always tied these corroborating pieces of evidence back to J. R.'s testimony, thus we can conclude only the prosecutor's reliance on such corroborating evidence was merely incidental to its reliance on the direct evidence provided by J. R. Accordingly, the trial court did not err by refusing to instruct the jury with CALCRIM No. 224.

B

CALCRIM No. 301

CALCRIM No. 301 provides in part: The "testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." CALCRIM No. 301 should be given sua sponte in every criminal case in which no corroborating evidence is required. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.) The parties agree, as do we, that the court failed to give this required instruction. The People argue, however, that any error resulting from this failure is harmless. We agree.

An error in instructing the jury will result in a reversal of the judgment only if the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; see also *People v. Rogers*, *supra*, 39 Cal.4th at pp. 885-887.) A miscarriage of justice occurs where it appears reasonably probable that the defendant would have achieved a more favorable result had the error not occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)[3]

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[3] Defendant argues the error was of a federal constitutional nature because it had the effect of lowering the prosecution's burden of proof. We disagree. While the jury was informed defendant's guilt could be based on the testimony of the complaining witness alone, it was also repeatedly instructed on the prosecution's reasonable doubt burden and

Defendant argues that had the jury known it could use defendant's former girlfriend's testimony alone to establish a fact, then it would have established that defendant's semen was in the shed because he had sex with his former girlfriend there, thus contradicting J. R.'s testimony and making it reasonably likely a more favorable outcome would have resulted. First, more than just defendant's former girlfriend established defendant had sex with someone other than his daughter in the shed. The DNA evidence revealed the presence of three DNA profiles, thus corroborating defendant's former girlfriend's testimony and providing an explanation for the presence of his semen in the shed. Therefore, the jury could have considered this inference without CALCRIM No. 301 being given. Second, it is not the presence of defendant's semen that is so damming, but its presence with J. R.'s DNA. Had the jury known the testimony of defendant's former girlfriend could establish the reason defendant's semen was in the shed, it still had to determine why J. R.'s DNA was also there. We do not see how the presence of the omitted instruction would have helped defendant in that regard. The defense was that J. R. was lying and her DNA was in the shed through transfer. The jury rejected that theory. Accordingly, it is not reasonably probable a more favorable outcome would have resulted had the jury been properly instructed.

IV

There Was No Cumulative Error

Defendant seeks reversal based on cumulative error. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Here, we concluded there was one instructional error, but the error was harmless. Accordingly, there was no cumulative error.

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the jury's duty to fairly weigh the evidence. From the whole of the instructions, it is clear the jury was not confused as to the prosecutor's burden, thus the *Chapman* harmless-error standard does not apply. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].)

V

The Abstract Of Judgment Must Be Corrected

Defendant contends the abstracts of judgment must be corrected to properly reflect the oral imposition of judgment. Specifically, he argues the abstract of his determinate sentences mistakenly includes the prior prison term enhancements imposed on his indeterminate sentences and it mistakenly characterizes those enhancements as being imposed under section 667.61, subdivision (m). We agree and find other errors in the abstracts as well. We will correct them accordingly. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [courts may correct clerical errors at any time].)

The abstract of judgment containing defendant's determinate sentence should reflect he was sentenced to the upper term of three years for each of his incest convictions and that those sentences were stayed. This abstract should also not contain any of the one-year enhancements listed in item 2 reserved for enhancements "TIED TO SPECIFIC COUNTS" because those enhancements were imposed on defendant's indeterminate sentences. The abstract of judgment containing defendant's indeterminate sentence should include these enhancements in item 2 but list them as imposed pursuant to section 667.5, subdivision (b). Further, item 6 must provide defendant was sentenced to 25 years to life on count 23. Finally, the wrong box is checked in item 8. It currently provides defendant was sentenced pursuant to the three strikes law when he was actually sentenced pursuant to section 667.61, which is the next box in order under that item.

DISPOSITION

The judgment is affirmed. The abstract of judgment containing defendant's determinate sentence is ordered corrected to reflect he was sentenced to the upper term of three years for each incest conviction and to remove all enhancements listed in item 2. The abstract of judgment containing defendant's indeterminate sentence is ordered corrected to reflect the prior prison term enhancements imposed on each of his indeterminate term convictions, that he was sentenced to 25 years to life on count 23, and

that he was sentenced pursuant to section 667.61. The clerk of the trial court is ordered to prepare a corrected abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
Robie, Acting P. J.

We concur:

/s/
Murray, J.

/s/
Hoch, J.